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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1198

LEWIS HERBERT CAIN
and
JAMES ROBERT COLEMAN,
Petitioners,

v.

STATE OF MARYLAND,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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INDEX

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 3

QUESTIONS PRESENTED 3

STATEMENT OF FACTS 3

ARGUMENT:–

I. The Petitioners were deprived of due process of law guaranteed them by the Fourteenth Amendment of the Constitution of the United States and Article 21 of the Maryland Declaration of Rights by the refusal of the Maryland Court of Appeals to reverse the convictions of the Petitioners when the warrants charging the Petitioners alleged no crime 4

II. The Petitioners were deprived of due process of law guaranteed them by the Fourteenth Amendment of the Constitution of the United States and Article 21 of the Maryland Declaration of Rights by the refusal of the Maryland Court of Appeals to reverse the convictions of the Petitioners when the warrants charging them failed to allege sufficient facts to apprise the Petitioners of the particular crime with which they were charged 11

CONCLUSION 12

Page

APPENDIX:–

Mandate of Court of Appeals of Maryland 1

Unreported Opinion of Court of Appeals of Maryland 2

Order of Court of Appeals of Maryland 7

Unreported Opinion of Court of Special Appeals of Maryland 8

Proceedings (excerpts from transcript) 29

Charging Documents 33,34

TABLE OF AUTHORITIES

Cases

Baker v. State, 6 Md. App. 148 9
Byrd v. State, 16 Md. App. 391 8
Gray v. State, 216 Md. 410 9
Lank v. State, 219 Md. 433 9
Pearlman v. State, 232 Md. 251 8
Prior v. State, 10 Md. App. 161 9
Turner v. State, 242 Md. 408 9
United States v. Nixon, 235 U.S. 231, 35 S. Ct. 49 9
Williams v. United States, 168 U.S. 382, 18 S. Ct. 92 9

Statutes

Constitution of the United States Fourteenth Amendment 10
Article 21 of the Maryland Declaration of Rights 4,8,10,11

Page

Article 66C, Section 696(d) of the Annotated Code of Maryland (1957 ed.) 7,10
Article 66C, Section 701(a) of the Annotated Code of Maryland (1957 ed.) 7,11

Rules

Maryland Rule 702(a) 5
Maryland Rule 712(a) 5
Maryland Rule 725(b) 6
Maryland Rule 855 6

IN THE

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LEWIS HERBERT CAIN
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v.

STATE OF MARYLAND,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

Lewis Herbert Cain and James Robert Coleman, Petitioners, pray that a Writ of Certiorari be issued to review the judgment of the Court of Appeals of Maryland entered

December 10, 1973, in affirming the Court of Special Appeals of Maryland affirming of the convictions of the Petitioners under Criminal No. 2025 (Warrant No. 064032 as to Cain) and Criminal No. 2031 (Warrant No. 064081 as to Coleman) in the Circuit Court for Kent County, Maryland, in the case of Lewis Herbert Cain and James Robert Coleman, Petitioners v. State of Maryland, Respondent, No. 67, September Term, 1973, and Miscellaneous Docket No. 45. (Criminal) September Term, 1973.

CITATIONS TO OPINIONS BELOW

The mandate of the Court of Appeals of Maryland dated December 10, 1973, is numbered No. 67, September Term, 1973, and a copy of said mandate is printed in the Appendix to this Petition page A1. The opinion of the Court of Appeals of Maryland is unreported and a copy of said opinion is printed in the Appendix at page A2. The Order of the Court of Appeals of Maryland granting the Writ of Certiorari to the Court of Special Appeals of Maryland is numbered Miscellaneous Docket No. 45 (Criminal) September Term, 1973, and a copy of said Order is in the Appendix at page A7.

The unreported opinion of the Court of Special Appeals of Maryland, is No. 309, September Term, 1972, and a copy of said opinion appears at page A8 of the Appendix. The Honorable J. DeWeese Carter dissented in that opinion, a copy of which appears at page A23 of the Appendix.

Excerpts of the testimony at pages 29-33 of the Appendix reveal the rulings and opinions of the trial court.

JURISDICTION

The Opinion of the Court of Appeals of Maryland sought to be reviewed was filed on November 8, 1973. The mandate of the Court of Appeals of Maryland was entered on December 10, 1973. The jurisdiction of this court is invoked under Title 28, Section 1257(3) of the United States Code.

QUESTIONS PRESENTED

1. Were the Petitioners deprived of due process of law guaranteed them by the Fourteenth Amendment of the Constitution of the United States and Article 21 of the Maryland Declaration of Rights by the refusal of the Maryland Court of Appeals to reverse the convictions of the Petitioners when the warrants charging the Petitioners alleged no crime?

2. Were the Petitioners deprived of due process of law guaranteed them by the Fourteenth Amendment of the Constitution of the United States and Article 21 of the Maryland Declaration of Rights by the refusal of the Maryland Court of Appeals to reverse the convictions of the Petitioners when the warrants charging them failed to allege sufficient facts to apprise the Petitioners of the particular crime with which they were charged?

STATEMENT OF FACTS

Arrest warrants were brought against the Petitioners in the District Court of Maryland for Kent County charging them with

"did unlawfully hand scrape oysters with an unlicensed boat, contrary to law" (A. 33-34).

Subsequently the matter was transferred to the Circuit Court for Kent County, Maryland for trial in Criminal Nos. 2025 and 2031. At the trial the Petitioners raised the question of not being charged with a crime at the end of the State's case (A 29-32) and again at the end of the entire case (A. 32). In both instances the motions were denied (A. 31-33). The Petitioners were convicted by the jury in Criminal Nos. 2025 and 2031 of violating Article 66C, Section 701(a) of the Annotated Code of Maryland (1957 ed.) which in essence makes it unlawful to have in tow or on board an unlicensed power boat any scoop, scrape, dredge or similar instrument used in dredging.

The Court of Special Appeals of Maryland considered the matter on appeal and a majority of that court affirmed the convictions (A. 8) with Judge Carter dissenting (A. 23). The Court of Appeals of Maryland issued a writ of certiorari to the Court of Special Appeals (A. 7) and the Court of Appeals affirmed the convictions (A. 1-6).

ARGUMENT

I.

THE PETITIONERS WERE DEPRIVED OF DUE PROCESS OF LAW GUARANTEED THEM BY THE FOURTEENTH AMENDMENT OF THE CONSTITITION OF THE UNITED STATES AND ARTICLE 21 OF THE MARYLAND DECLARATION OF RIGHTS BY THE REFUSAL

OF THE MARYLAND COURT OF APPEALS TO REVERSE THE CONVICTIONS OF THE PETITIONERS WHEN THE WARRANTS CHARGING THE PETITIONERS ALLEGED NO CRIME.

The Petitioners having raised this argument in the trial court at the end of the State's case and again at the end of the entire case (A. 29-32) as well as before the Court of Special Appeals and Court of Appeals certainly feel the matter should be reviewed again.

Maryland Rule 702(a) reads as follows:

> " 'Indictment' shall include an indictment, a criminal information, and a warrant issued by a justice of the peace where a jury trial was prayed before a trial magistrate or an appeal has been taken from a trial magistrate."

The rule was amended subsequent to this trial to include District Court warrants.

Maryland Rule 712(a) reads as follows:

> "An indictment shall contain a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged. It need not contain any other matter not necessary to such statement, nor need it negative an exception, excuse or proviso contained in a statute creating or defining the offense charged. An allegation made in one count may be incorporated by reference in another count. An unnecessary allegation may be disregarded as surplusage and on motion of the

> defendant may be stricken from the indictment by the court."

Maryland Rule 725(b) reads as follows:

> "Defenses and objections based on defects in the institution of the prosecution or in the indictment, *other than that it fails to show jurisdiction in the court or to charge an offense,* must be raised by motion before trial". (emphasis supplied)

Maryland Rule 885 pertaining to appeals in the Court of Appeals of Maryland reads as follows:

> "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. *Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court."* (emphasis supplied)

The Petitioners contend that the objection was properly made and not waived (A.29-32),but assuming arguendo that it was not, the convictions should have been struck down by virtue of Maryland Rule 885. The unreported opinion of the Court of Appeals (A. 5) clearly reveals that it did not consider that the Petitioners had waived the argument that no offense had been charged which reads in part:

"* * * Insofar as this argument is intended to support the contention that no crime had been charged, it is clearly without merit. * * *"

The gravamen of this argument is that the language in the warrants (A. 33-34) does not state any crime. Nowhere in the Maryland statutes does it appear that it is unlawful to "hand scrape" oysters. The closest definition to "hand scrape" in the statute appears in Article 66C, Section 696(d) of the Maryland Code, which reads as follows:

"Handscrape – Any dredge as defined herein cast and hauled by hand and without any winch, winder or spool."

The laws of Maryland do not make it a crime to hand scrape oysters. The trial court refused to dismiss the charges which resulted in the Petitioners being tried and convicted of Article 66C, Section 701(a) of the Maryland Code which reads as follows:

"(a) Dredge boats. – It shall be unlawful for the owner, captain or master, or any member of the crew of any boat capable of self-propulsion by any motor, turbine or other engine attached to said boat, to have on board such boat, or in tow, or to permit on board or in tow, any scoop, scrape, dredge or similar instrument used in dredging, or any winch, spool, winder or other tackle used in dredging, unless said boat be licensed to dredge on leased land, or unless said boat be engaged in taking seed oysters under the surveillance and with the permission of the Department of Chesapeake Bay Affairs. Notwithstanding any other provisions of this section and subtitle, in the waters of the Chesapeake Bay where dredging is permitted, the Department of

> Chesapeake Bay Affairs may designate by regulation, a time or times, not to exceed two days in any one week, during which those boats defined under § 696(f), and licensed under the provisions of §§ 702 or 703 of this article, may propel any such dredge boat by means of the auxiliary yawl boat carried on the dredge boat, and the Department shall further prescribe the maximum daily limit on such day or days."

Article 21 of the Maryland Declaration of Rights in part reads as follows:

> "That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defense * * * *"

It was held by the Court of Appeals in *Pearlman v. State*, 232 Md. 251 at p. 257 as follows:

> "An indictment must be so framed as to inform the defendant of the charge against him in order that he may prepare his defense and may also protect himself against a subsequent prosecution for the same offense.* * * This right is guaranteed by Article 21 of the Maryland Declaration of Rights and the due process clause of the Fourteenth Amendment to the Constitution of the United States."

In *Byrd v. State*, 16 Md. App. 391 at pp. 396-397 the Court of Special Appeals has again set forth the two requisites that the indictment must inform the accused of the offense for which he is charged and must describe sufficiently the offense for which he is charged and must describe sufficiently the

offense to preclude the possibility of a future prosecution for the same offense. See also *Baker v. State,* 6 Md. App. 148; *Gray v. State,* 216 Md. 410; and *Lank v. State,* 219 Md. 433.

The trial court below took the position that because the charging document made reference to the article and section with which the Petitioners were being charged that this was "* * * merely a shorthand way of saying that he took oysters under circumstances when he shouldn't have***." (A. 31-32) The trial court found in his reasoning that the "terminology of the statute is not used sufficiently to advise an accused".

In *Prior v. State,* 10 Md. App. 161 the Court of Special Appeals has held that a parenthetical reference to the wrong statute at the conclusion of a count in an indictment did not adversely affect a valid count. Converse reasoning should be applied to the present case to hold that a proper statutory reference somewhere in the body of the charging document will not correct an otherwise faulty warrant or indictment.

The Court of Appeals held in *Turner v. State,* 242 Md. 408 at p. 414:

> "* * * It is elementary that a defendant may not be found guilty of a crime of which he was not charged in the indictment."

In *Williams v. United States,* 168 U.S. 382, 18 S.Ct. 92, the Supreme Court held that an otherwise sufficient indictment was not invalidated by a reference to the wrong statute in the margin of the indictment. In *United States v. Nixon,* 235 U.S. 231, 35 S.Ct. 49, this Court held that a reference to the wrong statute in the caption of an indictment

likewise did not invalidate the indictment. In so holding it was stated at p. 235:

> "These entries are useful and convenient means of reference, and in case of doubt might possibly be of some assistance in determining what statute was alleged to have been violated. But these entries form no part of the indictment (Williams v. United States [supra] and neither add to nor take from the legal effect of the charge. * * * On what statute the indictment was founded was to be determined as a matter of law from the facts therein charged."

It is evident that the warrants charge no crime. There is no Maryland statute which forbids the taking of oysters from State waters by apparatus when cast and hauled by hand. If the definition in Article 66C, Section 696 (d) is of any help in determining what it means to "hand scrape" oysters it would in no way indicate that the accused had in tow or on board his powered boat a dredge or scrape and was required to defend such an allegation.

The trial and appellate courts below have failed to meet their heavy responsibility to protect the rights of the Petitioners to which they are entitled under the decisions and cases cited herein. The decision in this matter is not in accord with applicable decisions of this Court nor in accord with applicable state decisions under Article 21 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

II.

THE PETITIONERS WERE DEPRIVED OF DUE PROCESS OF LAW GUARANTEED THEM BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 21 OF THE MARYLAND DECLARATION OF RIGHTS BY THE REFUSAL OF THE MARYLAND COURT OF APPEALS TO REVERSE THE CONVICTIONS OF THE PETITIONERS WHEN THE WARRANTS CHARGING THEM FAILED TO ALLEGE SUFFICIENT FACTS TO APPRISE THE PETITIONERS OF THE PARTICULAR CRIME WITH WHICH THEY WERE CHARGED.

For the sake of brevity the Petitioners would incorporate herein Argument I as the cases, issues and statutes involved are the same. The Petitioners would add that for the charging warrants to meet the established standards of defense and preclusion of possible future prosecution, facts would have to be alleged which fall within Article 66C, Section 701 (a), supra. The warrants would have to allege in the disjunctive that the Petitioners had in tow or on board a boat capable of self-propulsion by any motor, a scrape or dredge or other instrument used for dredging oysters. Necessarily, a boat powered by sail or oar does not violate the statute.

Without the necessity of further argument, the mere statement of the situation reveals a violation of the constitutional guarranty of due process.

CONCLUSION

For the reasons above stated the Petitioners pray that this Petition may be granted.

Respectfully submitted,

DAVID M. WILLIAMS,
Attorney for Petitioners.

APPENDIX

In The Court of Appeals of Maryland

No. 67

September Term, 1973

LEWIS HERBERT CAIN

and

JAMES ROBERT COLEMAN

v.

STATE OF MARYLAND

MANDATE

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, the case of *Lewis Herbert Cain and James Robert Coleman v. State of Maryland* came before you and wherein the judgment of the said Court of Special Appeals of Maryland was duly entered on the sixth day of March, 1973 which was brought into the Court of Appeals of Maryland by virtue of a writ of certiorari dated May 2, 1973; and

WHEREAS, in the September Term, 1973 the said cause came on to be heard before the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on November 8, 1973 by this Court that the judgments of the Court of Special Appeals be affirmed;

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause in conformity with the judgment of this Court above stated as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS the Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland this 10th day of December, 1973.

/s/ James H. Norris, Jr.
Clerk
Court of Appeals of
Maryland

Filing Fee (writ) $10.00

Murphy, C.J.
Barnes
Singley
Smith
Digges
Levine,
JJ.

PER CURIAM
(Filed November 8, 1973)

A Commissioner of the District Court of Maryland issued warrants for the arrest of the appellants, Cain and Coleman, charging that on "... January 2, 1972 at 10 P.M. at Rock Hall, Maryland ... [each appellant] ... did unlawfully handscrape oysters with an unlicensed boat, contrary to law ... [in] ... violation of Code, Art. 66C, Sec. 701 a ...."

The appellants requested and were granted jury trials, and their cases were consolidated for trial in the Circuit Court for Kent County. They were found guilty, sentences were imposed, and each appealed to the Court of Special Appeals, which affirmed the judgments in an unreported opinion, filed March 6, 1973. In response to the appellants' contention that the warrants failed to charge a criminal offense, the court

stated that "[i]t is pellucid from the transcript of the proceedings that all parties concerned accepted that in Criminals 2025 and 2031, Cain and Coleman were charged with unlawfully having a dredge on board the boat." The court agreed with the circuit court's conclusion that the statements of fact in the warrants were merely a shorthand way of saying that the appellants took oysters "... when ... [they] ... shouldn't have because ... [they weren't] ... licensed as provided by this article and ... [they] ... took them by means of a dredge or scrape." The court noted that "... it would have been better had the statement of facts not been quite so concise."

We granted certiorari limited to the question of "whether the warrants in this case charge an offense that would support the convictions."

The appellants contend that the factual allegations in these warrants do not charge a violation of Maryland Code, (1957 Ed., 1970 Repl. Vol.) Art. 66C, § 701 (a). They argue that the warrants fail to state "... the essential facts constituting the specific offense..." with which they were charged, as required by Maryland Rule 712 a;[1] or to charge the offense in words equivalent to those employed in § 701 (a), so as to inform them and the court of the particular offense charged and the statute upon which the charge was founded. See *Baker v. State*, 6 Md. App. 148, 250 A.2d 677 (1969). The appellants also urge that the warrants fail to comply with the basic purposes served in charging an accused with a criminal offense, *viz.*, to "characterize the crime and describe the particular offense 'as to put the accused on notice of what he is called upon to defend and to prevent a

[1] Rule 712 a provides in relevant part:

> "An indictment shall contain a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged."

future prosecution for the same offense.' " See *Lank v. State*, 219 Md. 433, 436, 149 A.2d 367, 368 (1959).

In *Putnam v. State*, 234 Md. 537, 200 A.2d 59 (1964), we dealt with the question of whether an information sufficiently charged an offense. We stated:

> "The rule which seems to be generally recognized draws a line of demarcation between an indictment or information which completely fails to state an offense and one which alleges all the elements of the offense intended to be charged and apprises the accused of the nature and cause of the accusation against him, even though it is defective in its allegations or is so inartificially [inartfully] drawn that it would have been open to attack in the trial court." 234 Md. at 541, 200 A.2d at 61.

Although the warrants were inartfully drawn, we think they charged "all the elements of the offense" and apprised the appellants of "the nature and cause" of the charge against them. The warrants charged violations of Art. 66C, § 701 (a) which provides in relevant part:

> "It shall be unlawful for the owner, captain or master or any member of the crew of any boat capable of self-propulsion by any motor . . . attached to said boat, to have on board such boat, or in tow, or to permit on board or in tow, any scoop, scrape, dredge or similar instrument used in dredging . . . unless said boat be licensed to dredge on leased land, or unless said boat be engaged in taking seed oysters under the surveillance and with the permission of the Department of Chesapeake Bay Affairs. . . ."

As heretofore indicated, the warrants allege that the appellants "did unlawfully handscrape oysters with an

unlicensed boat, contrary to law . . . [in] . . . violation of Art. 66C § 701 (a)." "Handscrape" is defined in Art. 66C § 696 as "[a]ny dredge as defined herein cast and hauled by hand and without any winch, winder or spool." The appellants concede that, applying this definition to the charge contained in the warrants, the allegations there contained are equivalent to charging that they "did unlawfully cast and haul a dredge, by hand, to catch oysters, with an unlicensed boat, contrary to law." Such allegations are plainly sufficient to charge that the appellants permitted a dredge on board the boat. Likewise, it is implicit in the charge that the appellants were "members of the crew" of that boat. Section 701 (a), however, only makes it unlawful to have a dredge upon ". . . any boat capable of self-propulsion by any motor . . . attached to *said* boat . . . unless *said* boat be licensed . . ." by the State. (Emphasis added). The allegation that the appellants handscraped ". . . with an unlicensed boat . . ." is sufficient to charge their use of a boat capable of self-propulsion within the proscription of § 701 (a), a provision which they were explicitly charged with violating. The warrants, therefore, though poorly drafted, charge an offense within the rule recognized in *Putnam, supra.* Moreover, they fully comply with the purposes of charging an accused noted in *Lank, supra,* and adequately fulfill the mandate of Maryland Rule 712.

The appellants argue that the inclusion of essential facts, required by Rule 712, is necessary to advise the accused of charges against him in a manner enabling him to prepare his defense. Insofar as this argument is intended to support the contention that no crime had been charged, it is clearly without merit. We recognized in *Putnam* that an information may state an offense but still be so defective in its allegations that it is subject to attack in the trial court. An indictment may sufficiently describe an offense, but fail to allege other facts, necessary to enable the accused to prepare his defense. See *State v. Lassotovitch,* 162 Md. 147, 159 A. 362 (1932).

The appellants waived any objection to such defects in this case by failing to raise the matter by motion prior to trial, as required by Maryland Rule 725 b.[2]

JUDGMENTS OF COURT OF SPECIAL APPEALS AFFIRMED.

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[2] Rule 725 provides in pertinent part:

"Defenses and objections based on defects in the institution of the prosecution or in the indictment, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion before trial."

IN THE COURT OF APPEALS OF MARYLAND
Miscellaneous Docket No. 45 (Criminal)
September Term, 1973
(No. 309, September Term, 1972
Court of Special Appeals)
LEWIS HERBERT CAIN and
JAMES ROBERT COLEMAN
v.
STATE OF MARYLAND

ORDER

Upon consideration of the petition for writ of certiorari to the Court of Special Appeals of Maryland, it is this 2nd day of May, 1973,

ORDERED by the Court of Appeals of Maryland that the writ of certiorari to the Court of Special Appeals shall issue and said case shall be transferred to the regular docket as No. 67, September Term, 1973, and that review in this case shall be limited to the question whether the warrants in this case charge an offense that would support the convictions; and it is further

ORDERED that counsel may file additional briefs, said brief for appellants, Lewis Herbert Cain and James Robert Coleman, to be filed on or before June 11, 1973 and the brief for the appellee, State of Maryland, to be filed on or before July 11, 1973.

/s/ Robert C. Murphy,
Chief Judge

Orth, C.J.
Carter,
Gilbert,
JJ.

Per Curiam
Carter, J. Dissenting
(Filed March 6, 1973)

On 10 January 1972, on the sworn application of William A. Hurley, Inspector, Maryland Marine Police, a Judicial Commissioner of the District Court of Maryland, Chestertown, Kent County, issued two arrest warrants commanding the arrest of LEWIS HERBERT CAIN. Warrant No. 064032 gave as a "Concise statement of essential facts constituting offense charged" that on January 2, 1972 at 10:00 p.m. at Rock Hall, Maryland, Cain "DID UNLAWFULLY HAND SCRAPE OYSTERS WITH AN UNLICENSED BOAT CONTRARY TO LAW." It continued: "The said defendant is hereby formally charged with violation of Code, Art. 66 C, Sec. 701a . . ." Warrant No. 064033 gave as a "Concise statement of essential facts constituting offense charged" that on the same date, time, and place, Cain "DID UNLAWFULLY TAKE OYSTERS ON SUNDAY, CONTRARY TO LAW." It continued: "The said defendant is hereby formally charged with violation of Code, Art. 66 C, Sec. 698d . . ." The warrants were executed on 11 January 1972 by the arrest of Cain by Hurley. Cain appeared for trial in the District Court on 15 February 1972 and requested a jury trial. The request was granted, and he was released on his own recognizance "pending further action of the Circuit Court."

On 6 March 1972, on the sworn application of Hurley, the same Judicial Commissioner issued two arrest warrants commanding the arrest of JAMES ROBERT COLEMAN. Warrant No. 064080 gave as a "Concise statement of essential facts constituting offense charged" that on January 2, 1972 at 10:00 p.m. at Rock Hall, Maryland, Coleman "DID

UNLAWFULLY TAKE OYSTERS ON SUNDAY, CONTRARY TO LAW," and continued: "The said defendant is hereby formally charged with violation of Code, Art. 66 C, Sec. 698d ..." Warrant No. 064081 gave as a "Concise statement of essential facts constituting offense charged" that on the same date, time and place Coleman "DID UNLAWFULLY HAND SCRAPE OYSTERS WITH AN UNLICENSED BOAT, CONTRARY TO LAW," and continued: "The said defendant is hereby formally charged with violation of Code, Art. 66 C, Sec. 701a ..." The warrants were executed on 6 March 1972 by the arrest of Coleman by Hurley. Coleman appeared for trial in the District Court on 27 March 1972 and requested a jury trial. The request was granted and the papers in the case were filed with the Clerk of the Circuit Court for Kent County.

In the Circuit Court for Kent County warrant No. 064032 was docketed as Criminal 2025, warrant No. 064033 as Criminal 2026, warrant No. 064080 as Criminal 2030, and warrant No. 064081 as Criminal 2031. Cain was arraigned on each warrant on 6 April 1972, pleaded "Not Guilty" and elected trial by jury. On 25 April, upon motion and hearing, Criminals 2025, 2026, 2030 and 2031 were consolidated for trial. The warrants came on for trial on 22 May. Coleman was arraigned, pleaded not guilty and elected trial by jury. Trial proceeded and was concluded on that date. The verdict of the jury as to each warrant was "Guilty." Sentences were imposed. Cain and Coleman each appealed from the judgments.

I.

At the trial Sergeant William A. Hurley, the inspector with the Maryland Marine Police, was called to testify on behalf of the State. He was offered as an "expert on oystering equipment and its use and illegal dredging." After examination and cross-examination of him on the issue, the court said:

> "Well, I think that without ruling now, he will be able to answer any particular question. I would say that if a proper question is asked, and if the question seems to be directed in an area in which the ordinary, average person could not understand the question and answer without the aid of an expert to advise or help them understand it, then he may be permitted to answer questions. The Court believes that a person who has been engaged in the business of oystering for twenty years and for twenty years has been directly related to it as to enforcing the law, as well as assisting the department in removing oysters or whatever is necessary with respect to the activities that he has described, having participated in dredging, the Court believes that he does have such background and expertise that he ought to be permitted to assist in the trial if it appears that such assistance is warranted."

The direct examination of him proceeded. He testified that as a result of a telephone call received by him on Sunday, 2 January 1972, he went to Rock Hall accompanied by Inspectors Reese and Turner. They arrived there about 8:00 P.M.[1] and went to Cain's wharf, a private wharf owned by the father of Lewis Herbert Cain. The wharf is close to the jetties at Rock Hall. They hid behind a big ice box within two or three feet of the water. It was dark and very cold with a 20 mile an hour wind blowing. They had watched about two hours when Hurley saw a boat at the end of the pier, although he had not seen it approach. "I observed a silhouette of a person getting off the boat onto the wharf and walked a few steps to the end of the wharf. I heard a splash and the person getting back on the boat." A car driving down the road "blinked its lights once and then backed up and pointed

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[1] Hurley did not say whether it was 8:00 A.M. or P.M. but as his testimony proceeded it appeared to be P.M.

out like it was going out, turned its lights off, stopped its motor [and a person] got out of the car and started going around the car and decided against it and got back in the car and started up the motor and left . . . We made our move then. We ran from behind the ice box across this pier and lane here out to the wharf where the boat was, and advised the subjects to stay where they were." By the time they reached the boat Coleman had shoved it a short distance away from the wharf. Hurley told Coleman to come back and gave him a hand to help pull the boat back. The boat was a 22 foot bateau, about 7 feet wide and 1 1/2 feet deep. It was propelled by a 40 horsepower outboard motor. It was equipped with one light which could not be used for navigation, and, in any event, was not hooked up at the time. Hurley and the other inspectors searched the boat. There were only two persons on it, and Hurley made a positive judicial identification of them as the appellants, Coleman and Cain. They had on foul weather gear, rubber suits and boots, and they were very cold and wet, although it had not rained during the two hours the inspectors had watched the wharf. In the boat were "a pile of oysters, a shovel, some empty baskets, some lines, a hatchet, some beer." The pile of oysters was 7 feet wide (all the way across the bateau), about 7 feet long and 3 feet high. There were 45 or 50 bushels. The marine inspectors dragged the bottom in the vicinity of the boat with a grappling hook. At the end of the wharf, about 10 feet from the rear of the boat, they hooked a dredge and pulled it up. The dredge was identified and offered in evidence. Hurley described it and its use: "This has a line attached to the eye of it and it is pulled behind a boat and it is on the bottom. Anyhow, it lays on the bottom flat like that and it is pulled by power and as it is pulled along it breaks the oysters off the bottom and the oysters are fed back into this part here and every so often, depending on how thick the oysters are, it is pulled up and dumped on a

culling board and then it is thrown back in for more."[2] Hurley said the dredge was in the same condition as when it was recovered on 2 January except that the bottom plate – the "teeth" – were then "bright and shiny" from dragging the dredge through the sandy bottom. It would rust in about 18 to 24 hours. On a further search of the boat the officers found "a five gallon drum with a little small light bulb attached inside of it; it also has some lines with a clamp running from them to hook to a battery. We found the battery and equipment here." These articles were admitted into evidence. Hurley said the articles were used to cull oysters in the night time. "It is used to hide the light from being observed around you in the area, but yet it gives light in a smaller area. It floods the light right down on a board. . . . It's protected – that's why the can." Photographs of the pile of oysters in the boat were admitted in evidence. There was also a pair of tongs in the boat. The head and teeth of the tongs were rusted, very dull, indicating they had not been used that evening. Hurley further explained about the use of the dredge. It is pulled behind a boat by attaching it to the stern with a line. "It could be snap hook or tied. The quick way is to snap it on and throw it overboard and the boat goes ahead and pulls the dredge along." There was a line on the boat with a snap hook on it but the boat here did not have a ring bolt through the transom to attach it to. Hurley said the hatchet could be used "to cut the line in case the police, or the authorities get too close, they can just cut the line and let the dredge go." There were photographs of the boat introduced in evidence which showed markings on the washboards "of where the paint and the wood have been cut and scratched away by some instrument." There were similar markings below the water line "where the bateau has metal." There were also about 10 baskets of oysters sitting on the bottom in 6 or 7 feet of water with a line attached to each

[2] Obviously, Hurley was explaining the use of the dredge with it physically before him and the jury. As we have pointed out before, the State should take steps to have the record show clearly to what he was referring.

corner of the basket and to the wharf "so that anyone wanted them they could just pull them up."

Inspector Turner first saw the bateau when it was about 100 or 150 yards from the wharf. The area was well lit by lights from a nearby marina and restaurant. He lost sight of the boat when the car approached and next saw it when it was pulling up to the dock. "There was a large splash and one gentleman walked from the stern of the boat, over a pile of oysters, to the front." The bateau was registered in the name of Lewis Cain and was not licensed to dredge oysters. The State rested.

The defense called Cain. He said he was a commercial waterman and that Coleman was his partner, going out on the water with him every day. He claimed that on the Sunday in question he and Coleman went out in the boat to put decoys in front of his blind located about 1/2 mile outside the harbor in a northwesterly direction so he could go hunting the next morning. The motor broke down and they were adrift an hour, drifting with the wind, before they could get the motor started again. They returned to the blind, finished putting out the decoys, put all the decoy equipment in the blind and returned to the harbor. He denied attempting to shove off from the pier when the police inspectors approached. He did not know where the "scrape apparatus" came from. He claimed he used the barrel and light to help put out and recover the decoys. He said that he and Coleman had tonged the oysters on Saturday but the man who operated the buy boat had gone home for the holidays. "[T]here was on one on the buy boat to take the oysters on board, so we kept the oysters in the boat." The oysters in the baskets handing from the pier did not belong to him.

E. Thomas McGlinn testified that he was the lessee of the duck blind referred to by Cain. He had an arrangement with Cain and Coleman that they would repair the blind and assist McGlinn "in arranging decoys and things like that for the

people I wanted to take hunting there as my own personal guests." For that consideration, plus a sum of money paid by Cain and Coleman, McGlinn allowed them to use the blind also any time during the legal hunting season.

II.

Appellants claim that the court below erred in permitting Hurley to testify to evidentiary matters which required the opinion of an expert. The only matter to which they refer is his testimony regarding the lack of rust on the dredge. Hurley testified that the dredge as exhibited at the trial was in the same condition as it was when it had been "picked up from the bottom on January 2nd 1972 with one exception." At the time the dredge was recovered the teeth on the bottom plate were bright and shiny. "As a result of dragging on the bottom this plate becomes very shiny from dragging through the sandy bottom. After it sets up a while it rusts." All this came in without objection. The transcript thereafter reads:

> "Q. [by the State's Attorney] How much time would it take the equipment to get rusty from unuse?
>
> (Mr. Williams) [Defense Counsel] I object to that your Honor.
>
> (Judge Rasin) Well, if he knows. Ask him if he knows.
>
> Q. If you know. A. Approximately 24 –
>
> (Judge Rasin) The question is do you know – yes or no?
>
> Q. Do you know? A. Approximately.
>
> (Judge Rasin) There are various degrees of rust, I guess. Overrule the objection.

Q. How much time? A. Between an 18 and 24 hour period it would become rusty again starting here."

In the light of Hurley's broad and extensive experience in oystering and the use of oystering equipment, and his knowledge in that field, we believe the court was properly satisfied that his evidence was entitled to credit. *Wilson v. State*, 181 Md. 1, 6; *Harding v. State*, 5 Md. App. 230, 236.

III.

Appellants urge that the trial court erred in admitting the dredge into evidence and in refusing to instruct the jury to disregard all testimony related thereto. The real test of admissibility is the connection of the evidence with the offense charged, as a matter which has a natural tendency to establish the fact at issue should be admitted. As to the question of the connection between the defendant and the evidence, probability is the only requirement, and if there is any doubt, it goes to the weight and not to the admissibility of the evidence. *Gray v. State*, 10 Md. App. 478, 487. In overruling the objection to the admissibility of the dredge the court said:

"[T]he Court believes that the fact that it is a device used for the taking of oysters, that it was found under the evidence within a distance of from 8 to 10 feet from the Defendant's boat, and that there were oysters on the boat, and that the teeth and the plate on which the teeth are apparently attached, according to one of the witnesses, was shiny bright, and that within a matter of 18 to 24 hours it starts to rust, the Court thinks that that piece of evidence is material to the case and is relevant to the case and I don't think it is necessary to prove ownership of the Defendants, if you can prove ownership of a particular dredge of this nature. It is circumstantial

> evidence and it is up to the jury to determine whether or not the testimony in the case – from the testimony in the case whether or not they are going to use that piece of evidence to find either of the Defendants guilty of a violation of the law . . ."

We hold that the court did not abuse its discretion in overruling the objection to the admission of the dredge.

IV.

Appellants claim a jurisdictional question as to Criminals 2025 and 2031. They allege that the warrants in those cases did not charge an offense. The warrants clearly charged an offense. Each expressly set out: "The said defendant is hereby formally charged with violation of Code, Art. 66 C, Sec 701a, contrary to the form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State." Code, Art. 66 C, Sec 701 (a) provides, in relevant part:

> "It shall be unlawful for the owner, captain or master, or any member of the crew of any boat capable of self-propulsion by any motor . . . to have on board such boat, or in tow, or to permit on board or in tow, any scoop, scrape, dredge or similar instrument used in dredging . . . unless said boat be licensed to dredge on leased land, or unless said boat be licensed to dredge on leased land, or unless said boat be engaged in taking seed oysters under the surveillance and with the permission of the Department of Chesapeake Bay Affairs."

Appellants, however, point to the "Concise statement of essential facts constituting offense charged" as it appears in the warrants. This statement in each warrant as to the respective accused reads that he "on or about January 2,

1972 at 10:00 P.M. at Rock Hall, Maryland did unlawfully hand scrape oysters with an unlicensed boat, contrary to law." They argue that the statute contains no provision prohibiting the hand scraping of oysters.

It is pellucid from the transcript of the proceedings that all parties concerned accepted that in Criminals 2025 and 2031 Cain and Coleman were charged with unlawfully having a dredge on board the boat. The question here presented came up below at the instance of the trial judge. At the close of the State's case appellants moved for a judgment of acquittal. As to Criminals 2025 and 2031 defense counsel referred to the charge as "having possession of a scrape or dredging apparatus." He argued that it was not in the possession of appellants but found in the water; it was not "on board" the boat. He read § 701(a) to the court. It was then that the court inquired about the statement of facts set out in the warrants. The discussion centered on what § 701(a) prohibited and there seemed to be agreement as to what its prohibitions were. The court said: "I think the District Court's practice is a little more flexible perhaps than the Circuit Court practice, and even though the specifications of the charge may not be artfully drawn, where it refers you to a specific section of the code, I think that should give you sufficient notice that it is what you are charged with." The court reconciled the statement of facts with the formal charge: "[T]his is merely a shorthand way of saying that he took oysters under circumstances when he shouldn't have because he wasn't licensed as provided by this article and he took them by means of a dredge or scrape." We agree, although we note that it would have been better had the statement of facts not been quite so concise. But see Maryland Rule 715 by which an accused may obtain a bill of particulars.

We hold that the warrants in Criminals 2025 and 2031 charged an offense within the jurisdiction of the Circuit Court

for Kent County. There being no lack of jurisdiction, any defect in the warrant was waived as not raised by motion before trial. Rule 725.b.

V.

Appellants remaining contentions go to the sufficiency of the evidence. The question is before us on the denial of motions for judgment of acquittal made at the close of all the evidence. Such motions made at the close of evidence offered by the State were, of course, withdrawn by the offering of evidence by appellants. Rule 755.b.; *Williams v. State*, 5 Md. App. 450.

Criminals 2025 and 2031

Criminals 2025 and 2031 deal with the charge that appellants committed the offense proscribed by Code, Art. 66 C, § 701 (a). Defense counsel presented the motions on that basis: "[S]till there is no evidence . . .that there was any scrape or scoop or dredge either on this boat or in tow of this boat." We note the comments of the court in denying the motion for judgment of acquittal made at the close of the evidence offered by the State:

> "[T]he court believes that there is sufficient circumstantial evidence whereby a reasonable man could draw a reasonable inference that two people coming in at night time with oysters on their boat, and a splash being heard, and this device, being illegal under the circumstances, and being found within 8 to 10 feet of the boat, that they could logically conclude that they did have it either on board or in tow and therefore have violated the law."

We think that a jury could not only logically but properly so find. The evidence offered by the defense did not compel a contrary conclusion. Neither the judge in ruling on the

motion, nor the jury in considering all the evidence, were required to believe Cain's version of the events. The weight to be given the evidence and the credibility of the witnesses were for the jury. *Carter v. State,* 15 Md. App. 242, 247. There was no evidence sufficient to show that appellants were within the exceptions designated by § 701 (a). We find that the evidence was sufficient in law to establish that appellants were guilty of violating Code, Art. 66 C, § 701 (a). Therefore the court below properly submitted the evidence to the jury. We hold the trial court did not err in denying the motions for judgment of acquittal as to Criminals 2025 and 2031.

Criminals 2026 and 2030

The warrants in Criminals 2026 and 2030 formally charged appellants with violation of Code, Art. 66 C, § 698 (d). The concise statement of facts in the warrants was that appellants "did unlawfully take oysters on Sunday, contrary to law." Section 698 (d) provides, *inter alia:*

> "It shall be unlawful for any person to take oysters on Sunday . . ."

In overruling the motions for judgment of acquittal at the close of all the evidence, the court said that it believed "There is sufficient evidence that, if believed, would require disbelief of certain other evidence in the case, of which the jury could conclude by considering the direct evidence, the circumstantial evidence, and the inferences, to be drawn from the direct evidence that the Defendants are guilty of the charges . . ." We agree that the evidence was sufficient in law to sustain the convictions under Criminals 2026 and 2030. Again we note the comments of the court in overruling the motions made at the close of evidence offered by the State:

> "I think the inference could be drawn that you don't row around with 40 or 50 bushels of oysters in a bateau and that at least casts a burden on the accused to make an explanation as to why they were on board and when they were taken. Obviously, if they can make an explanation satisfactory to the jury then the jury will consider that testimony and they may very well find that the State has not met a burden of proof beyond a reasonable doubt that they were actually taken on Sunday."

The jury obviously did not believe appellants' explanation, but as we have said, it was not obliged to do so. We hold that the court did not err in submitting the evidence to the jury by denying the motions for judgment of acquittal. We observe that the test for the sufficiency of the evidence is the same whether the evidence be direct, circumstantial, or provided by rational inferences therefrom. *Metz v. State,* 9 Md. App. 15, 23.

VI.

By the provisions of Code, Art. 66 C, § 717 (a) (2), any person violating the provisions of § 698 (d) shall be guilty of a misdemeanor and upon conviction be fined not less than $100 nor more than $500, or be imprisoned in the house of correction not less than 3 months nor more than 6 months, or both fined and imprisoned, at the discretion of the court.

By the provisions of § 717 (d) any one violating the provisions of § 701 shall be guilty of a misdemeanor and upon conviction shall be fined not less than $500 nor more than $1000, and, in the discretion of the court, may also be imprisoned in the house of correction for a period of not more than one year, or may be both fined and imprisoned.

The docket entries in the cases before us read as to sentence:

> Criminal 2025 – "Lewis Herbert Cain shall pay a Fine of Six Hundred ($600.00) Dollars and costs, and as a punishment for his offense, shall be committed to Kent County Jail for a period of three (3) months. Sentence suspended, and he shall be placed on probation without supervision, for a period of three (3) years. Fine & costs to be paid thru the Dept. of Parole and Probation within 6 months."
>
> Criminal 2026 – "Lewis Herbert Cain shall pay a Fine of Two Hundred Fifty ($250.00) Dollars and costs thru the Dept. of Parole & Probation within 6 months."
>
> Criminal 2030 – "James Robert Coleman shall pay a Fine of Six Hundred ($600.00) Dollars and costs, and as a punishment for his offense, shall be committed to the Kent County Jail for a period of three (3) months. Sentence suspended, and he shall be placed on probation without supervision, for a period of three (3) years. Fine & costs to paid thru the Dept. of Parole & Probation within 6 months."
>
> Criminal 2031 – "James Robert Coleman shall pay a Fine of Two Hundred Fifty ($250.00) Dollars and costs thru the Dept. of Parole & Probation within 6 months."

It is patent from the transcript of the sentencing proceedings that in imposing sentence on Coleman the judge treated Criminal 2030 as the case in which a violation of § 701 (a) was charged and Criminal 2031 as the case in which a violation of § 698 (d) was charged. In fact, a violation of § 698 (d) was charged in Criminal 2030 and a violation of § 701 (a) was charged in Criminal 2031. It is clear that the

judge intended that the sentence he imposed in Criminal 2030 be for the conviction of having the dredge on board and that the sentence he imposed in Criminal 2031 be for the conviction of taking oysters on Sunday. There is no doubt whatsoever but that the sentences were transposed by inadvertence. Therefore, we vacate the sentence imposed in Criminal 2031 be for the conviction of taking oysters on Sunday. There is no doubt whatsoever but that the sentences were transposed by inadvertence. Therefore, we vacate the sentence imposed in each of Criminal 2030 and Criminal 2031 and remand those cases for imposition of a proper sentence. Of course, the conviction in each of those cases stands.

AS TO EACH OF CRIMINAL 2025 AND 2026; JUDGMENT AFFIRMED;

AS TO EACH OF CRIMINAL 2030 AND 2031: CONVICTION AFFIRMED AND SENTENCE VACATED: EACH CASE REMANDED FOR IMPOSITION OF PROPER SENTENCE

APPELLANT'S TO PAY COST

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
(No. 309, September Term, 1972
Court of Special Appeals)
LEWIS HERBERT CAIN and
JAMES ROBERT COLEMAN
v.
STATE OF MARYLAND

I concur in the opinion of the majority of my colleagues on the panel, except for part IV. This portion of the ipinion holds that the warrants in Criminals 2025 and 2031 properly charge a violation of *Md. Code*, Art. 66C, § 701(a). I do not agree.

FACTUAL ALLEGATIONS OF WARRANTS DO NOT CHARGE A VIOLATION OF SECTION 701(a)

Art. 66C, § 701(a) provides in part:

> "*Dredge boats.* – It shall be unlawful for the owner,*** or any member of the crew of any boat capable of self-propulsion by any motor,*** attached to said boat, to have on board such boat, or in tow,*** any*** scrape, dredge or similar instrument used in dredging,*** unless said boat be licensed to dredge on leased land, or unless said boat be engaged in taking seed oysters under the surveillance and with the permission of the Department of Chesapeake Bay Affairs.***"

As recited in the majority opinion the warrants read in pertinent part that the appellants "DID UNLAWFULLY HAND SCRAPE OYSTERS WITH AN UNLICENSED BOAT, CONTRARY TO LAW." This allegation is immediately above a parenthetical phrase that reads: "(Concise statement of essential facts constituting offense charged)." In a paragraph

which follows the concise statement there appears: "The said defendant is hereby formally charged with violation of Code, Art. 66C, Sec. 701(a), contrary to the form of the Act of Assembly in such case made and provided***."

The term HANDSCRAPE is defined in Art. 66C, § 696 titled "Definitions" as follows:

> "(d) *Handscrape.* – Any dredge as defined herein cast and hauled by hand and without any winch, winder or spool.

Applying this definition to the language employed in the warrants would mean that the factual allegations thereof are equivalent to charging that the appellants "did unlawfully cast and haul a dredge, by hand, to catch oysters, with an unlicensed boat, contrary to law." The substance of the crime proscribed by § 701(a) is to prohibit the owner or crew member of a boat capable of self-propulsion by motor attached thereto from having on board or in tow any dredge or scrape unless that boat be licensed to dredge or engaged in taking seed oysters with the permission of the Department of Chesapeake Bay Affairs. The language of the warrants fails to set forth these essential facts or their equivalent. Instead of charging the *unlawful possession of prohibited equipment* upon or in tow from a boat capable of self-propulsion with a motor attached as proscribed by the statute the warrants charge the *unlawful action of handscraping or dredging for oysters* with an unlicensed boat. An unlicensed boat could well refer to a dredge boat, i.e., one without a motor attached.[1]

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[1] "Dredge boat" as defined by Art. 66C, § 696(f) includes a boat used for dredging oysters that is not self-propelled.

Md. Rule 712 titled "Indictment" prescribes the requirements for charging criminal offenses in this State where the form of the charging document is not specially provided by statute. There is no statutory provision for the form of an indictment charging a violation of Art. 66C.[2] Rule 712 provides in pertinent part:

> "a. *Form and Content.*
>
> An indictment[3] [warrant] whall contain a plain, concise *and definite statement of the essential facts constituting the specific offense* with which the defendant is charged. It need not contain any other matter not necessary to such statement,***. An unnecessary allegation may be disregarded as surplusage***." (emphasis added)

The general rule to be applied in testi the sufficiency of an indictment charging the violation of a statutory offense was set forth by this Court in *Baker v. State*, 6 Md. App. 148. At pages 156-157 we said:

> "The general rule is that an indictment charging an offense denounced and defined by statute should be as *fully descriptive of the offense as is the language of the statute****.
>
> '****An indictment of information for such an offense is sufficient if it follows the language of the statute substantially or charges the offense in equivalent words or*

[2] For a listing of criminal offenses for which a form of the indictment is provided by statute, see "cross-reference" in footnote to Rule 712.

[3] For definition of "indictment" that includes warrant, see Md. Rule 702 a.

> *others of the same import if the defendant is thereby fully informed of the particular offense charged,* and the court is enabled to see therefrom on what statute the charge is founded.***' 4 *Wharton's Criminal Procedure,* § 1794, pp. 618-619 and § 1796, pp. 622-624." (emphasis added)

It is concluded that the allegations contained in the warrants fail to allege the essential facts constituting the offense proscribed by § 701 (a) as required by Md. Rule 712 a. or to charge the offense in words equivalent to those employed in § 701(a) as required by the general rule set forth in ***Baker v. State, supra.***

Furthermore, the charge as set forth in the warrants does not comply with the basic purposes to be served in charging an accused with a criminal offense. The Court of Appeals in *Lank v. State,* 912 Md. 433 said at page 436:

> "***It has been stated that the purpose of a criminal charge – be it state warrant, an information or an indictment – is two fold, that is, the charge must so characterize the crime and describe the particular offense 'as to put the accused on notice of what is calle; upon to defend and to prevent a future prosecution for the same offense.' *Gray v. State, supra* [216 Md. 410, 415].***"

In my opinion the factual allegations of these warrants do not meet this test. See also Art. 21 of the Md. Declaration of Rights.

THE REFERENCE TO SECTION 701(a) DOES NOT VALIDATE AN OTHERWISE DEFECTIVE CHARGE

It is the position of the majority that the reference in the body of the warrant to the statute, when considered together with the factual allegations, constitutes a valid charge of the

offense proscribed by § 701(a). In arriving at this holding it is pointed out that reference to the statute is made by an affirmative allegation on the face of the warrant that "[t]he said defendant is hereby formally charged with violation of Code, Art. 66C, Sec. 701(a)."

In *Williams v. United States*, 168 U.S. 382, 42 L.Ed. 509, 18 S.Ct. 92, the Supreme Court held that an otherwise sufficient indictment was not invalidated by a reference to the wrong statute in the margin of the indictment.[4] In *United States v. Nixon*, 235 U.S. 231, 59 L.Ed. 207, 35 S.Ct. 49, the Court held that a reference to the wrong statute in the caption of an indictment likewise did not invalidate the indictment. In so holding the Court said at page 235:

> "These entries are useful and convenient means of reference, and in case of doubt might possibly be of some assistance in determining what statute was alleged to have been violated.[5] But these entries form

[4] In *Capone v. United States* (CA7) 51 F.2d 609, 76 ALR 1534 cert. den., 284 U.S. 669, 76 L.Ed. 566, 52 S.Ct. 44 (1931) the Circuit Court of Appeals followed the holdings in *Williams, supra.*

[5] The *possible assistance* which a specific reference to the statute alleged to have been violated could render *in case of doubt* would appear to envision a situation where the factual allegations of the charging document, although sufficient in themselves, could possibly constitute a violation of one of several statutes. An example of such a situation would be a charge of "disorderly conduct to the disturbance of the public peace" which is a violation of the provisions of both § 122 and 123(c) of Art. 27 of the *Md. Code.* The language concerning the assistance that a reference to the statute might give when considered in the context of the entire opinion in *Nixon, supra* does not mean that a statutory reference can be considered as a substitute for an adequate factual recital nor that it can make an otherwise factually deficient warrant valid.

> no part of the indictment (*Williams v. United States [supra]* and *neither add to nor take from the legal effect of the charge. * * * [O]n what statute the indictment was founded was to be determined as a matter of law from the facts therein charged."* (emphasis added).

In *Baker v. State, supra* at 157 this Court held that where a statutory offense is sufficiently charged, it is not necessary to specify the 10 Md. App. 161, 169 we held that a parenthetical reference to the wrong statute at the conclusion of a count in an indictment did not adversely affect the validity of the count.

Applying the reasoning of these cases and the requirements of Md. Rule 712 a. I think it is clear that in order for a charging document to be legally sufficient in this State, unless the form is prescribed by statute, it must set forth "all of the essential facts" constituting the (statutory) offense charged. An allegation that the defendant is charged with violating a designated statute whether made in the caption of the indictment or conspicuously in the body of the charging document and irrespective of whether the identification of the statute is preceded by the words "is formally charged with" is no substitute for the required statement of the essential facts. The allegation of these facts is necessary in order to adequately advise the accused of the charged against him in a manner whereby he can understand the nature of those charges and properly prepare his defense. No authority has been cited and none is known which holds that a citation of the statute alleged to have been violated in a charging document is sufficient to properly charge an accused with a criminal offense. I therefore believe that the warrants are fatally defective and do not constitute a valid charge of a violation of § 701(a).

In *Turner v. State,* 242 Md. 408 the Court of Appeals said at page 414:

> "* * * [I]t is elementary that a defendant may not be found guilty of a crime of which he was not charged in the indictment."

Since the appellants were tried, convicted, and senteced in Criminals 2025 and 2031 for a violation of § 701(a) which was a crime of which they were not charged in the warrants, the judgments in these cases should be reversed.

Assuming the appellants' motions for judgments of acquittal, based on a claim that the warrants failed to sufficiently charge an offense that would support the convictions, were appropriate to raise the issue of jurisdiction then the motions should have been granted. In any event, since the failure to charge an offense is a matter of jurisdiction this Court may consider it under Rule 1085 whether or not it was properly presented and ruled upon below. See *Putnam v. State,* 234 Md. 537, 540-541 (footnote 1);*Baker v. State, supra,* at 151.

PROCEEDINGS AT END OF STATES CASE

(T. 65) (Before the Bench):

(Judge Rasin) You wish to make a motion, Mr. Williams?

* * * * *

Of course, I have some other motions for judgment of acquittal.

* * * * *

(T. 66) (Mr. Williams) Well, of course my next motion would be a motion for judgment of acquittal.

* * * * *

(T. 70) (Mr. Williams) As to having possession of a scrape or dredging apparatus, your Honor, we make the same motion. The Officers have stated he did not have it in his possession but only that they found it in the water, the same body of water, in the vicinity of this pier that he was tied to. As a matter of fact, the Officer stated he was not claiming he seized it from him. The statute (T. 71) reads "in his possession", or I beg your pardon, "on the boat". I can read it to your Honor. It is 701A of Article 66C, "It shall be unlawful for the owner, captain, master or member of a crew or a boat capable of self-propulsion by motor, turbine, or other engine attached to said boat to have on board" – and I think that is what he is charged with, having it on board, "a scrape or other apparatus". Is that the charge your Honor?

(Judge Rasin) No, the charge is, "did unlawfully hand scrape oysters with an unlicensed boat".

(Mr. Williams) Then the charge doesn't meet what the law says, because there certainly isn't any proof that he scraped oysters and even if he had the scrape on his boat, which he didn't. The evidence doesn't meet the test of 701A, not even by a centilitre of evidence, to permit the jury to even draw a slight inference that he hand scraped these oysters. He is not charged with having the scrape on his boat. If you read that statute very closely your Honor he is charged actually with no crime I suppose.

* * * * *

(T. 72) (Mr. Williams) He is not even charged with having it on his boat. I think before the Court makes a ruling I would like to –

(Judge Rasin) No, I am just discussing it to get your comment. I think the District Court's practice is a little more flexible perhaps than the Circuit Court practice, and even though the specifications of the charge may not be artfully drawn, where it refers you to a specific section of the code, I think that should give you sufficient notice that it is what you are charged with. I can understand your argument, but if you read the specifications they allege that he hand scraped oysters with an unlicensed boat, which would indicate if the boat were licensed he could hand scrape them, unless it is on leased land or (T. 73) under the supervision of the Department. Mr. Williams, is what you are saying, if it had said that, in the terms of the statute, that if he had on board or had in tow or permitted on board or permitted in tow, a hand scrape, and not being licensed, and not on leased land or under the surveillance of the Department, then that would be a correct charge, is that what you are saying?

(Mr. Williams) Well, yes, your Honor, I think it should have specified what the violation is that he is being confronted with, what that violation is. As it reads now, except for what your Honor has pointed as reference to the statute, I don't think that can be used to correct an otherwise faulty indictment or charge. I think that law says the charge has to be sufficient in toto and, of course, I go on with my argument that even if it were sufficient, there is no evidence that he has any apparatus of this sort on his boat.

(Judge Rasin) I am ready to rule now unless you want to say any more.

(Mr. Williams) No, but I want to make a motion on the other charge after that.

(Judge Rasin) On this motion, I believe that referring to the Statute Article 66B, Section 701A, regardless of the fact that the terminology of the statute is not used sufficiently to advise an accused person of the basis of the charge, this is

merely a shorthand way of saying that he took oysters under circumstances when he shouldn't have because he wasn't licensed as provided by this article and he took them by means of a dredge or scrape.

(T. 74) With respect to the direct evidence or circumstantial evidence, the Court believes that there is sufficient circumstantial evidence whereby a reasonable man could draw a reasonable inference that two people coming in at night time with oysters on their boat, and a splash being heard, and this device, being illegal under the circumstances, and being found within 8 to 10 feet of the boat, that they could logically conclude that they did have it either on board or in tow and therefore have violated the law. So I overrule your motion on that Mr. Williams. That would be # 2025 with respect to Cain and 2031 with respect to the other charges.

* * * * *

PROCEEDINGS AT END OF ENTIRE CASE

(T. 100) (Judge Rasin) Do you gentlemen have any requests? Suppose we ask the jury to retire at this time.

Mr. Williams, did you wish to make a motion?

(Mr. Williams) Yes, I would like to renew all my motions for acquittal as to both Defendants as to all charges

* * * *

(T. 101) (Judge Rasin) The Court believes there is sufficient evidence that, if believed, would require disbelief of certain other evidence in the case, of which the jury could conclude by considering the direct evidence, the circumstantial evidence, and the inferences, to be drawn from

the direct evidence that the Defendants are guilty of the charges and the Court will overrule the motion at the end of the entire case.

DISTRICT COURT OF MARYLAND
FOR KENT COUNTY

Arrest Warrant No. 064081

District Court of Maryland Chestertown, Kent County

To: Any law enforcement officer authorized to serve criminal proceedings, GREETINGS.

The sworn application of Inspector William A. Hurley, MD Marine Police of Chestertown, Maryland alleges that James Robert Coleman of Rock Hill, Maryland

DESCRIPTION OF ACCUSED: Sex___ Color ____ Age ____ Height ____ Weight____ Hair____ Eyes ____ Complexion____ Other: (Scars, tattoes, mustache, infirmities, etc. _____

_____

did on or about January 2, 1972 at 10:00 P.M. at Rock Hall, Maryland did unlawfully hand scrape oysters with an unlicensed boat, contrary to law. _____

_____

_____

Concise statement of essential facts constituting offense charged:

The said defendant is hereby formally charged with violation of Code, Art. 66C, Sec. 701a, contrary to the form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State.

You are, therefore, commanded to arrest the person charged and to bring him before me or some other judicial officer as required by law. Hereof fail not or leave you then and there the warrant.

Issued this 6 day of March, 1972.

/s/ Kathryn B. Ozma
Judicial Commissioner

DISTRICT COURT OF MARYLAND
FOR KENT COUNTY

Arrest Warrant
No. 064032

District Court of Maryland Chestertown, Kent County

To: Any law enforcement officer authorized to serve criminal proceedings, GREETINGS.

The sworn application of William A. Hurley, Inspector Maryland Marine Police of Chestertown, Maryland alleges that Lewis Herbert Cain of Rock Hall, Maryland

DESCRIPTION OF ACCUSED: Sex ____ Color ____ Age ____ Height ____ Weight ____ Hair ____ Eyes ____ Complexion ____

Other: (Scars, tattoos, mustache, infirmities, etc _____

_____

_____

did on or about January 2, 1972 at 10:00 P.M. at Rock Hall, Maryland did unlawfully hand scrape oysters with an unlicensed boat, contrary to law. _____

_____

_____

Concise statement of essential facts constituting offense charged.

The said defendant is hereby formally charged with violation of Code, Art. 66C, Sec. 701a, contrary to the form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State.

You are, therefore, commanded to arrest the person charged and to bring him before me or some other judicial officer as required by law. Hereof fail not or leave you then and there the warrant.

Issued this 10 day of January, 1972

/s/ Kathryn B. Ozman
Judicial Commissioner